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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The brief of Respondent Teamsters Local Union No. 676, which is limited to the issue of whether the instant controversy is moot, and the briefs of the Respondents New Jersey officials McCorkle and Engleman and *amicus* AFL-CIO, which address only the substantive question of whether strikers may, con-

sistent with federal labor policy, receive state welfare assistance, each advance several erroneous contentions which warrant a response.

THE MOOTNESS ARGUMENTS

The Petitioners' principal brief argued that, notwithstanding that the strikers in the instant case terminated their eligibility for welfare assistance after the decision of the District Court,[1] the constitutional issue as to the propriety of such assistance was not thereby rendered moot. This position was premised, *first*, on the probability of recurrence of both the alleged objectionable state action—the availability and payment of welfare benefits to strikers—and its impact on Petitioners; and, *second*, on the applicability of the "capable of repetition, yet evading review" standard of *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498, 515 (1911), which permits the probability tests to be "relaxed . . . by giving private plaintiffs," such as Petitioners, "sufficient stake to challenge governmental activity that may recur without requiring proof of certainty that they will then be affected . . . " Note, *Mootness On Appeal In The Supreme Court*, 83 Harv. L. Rev. 1672, 1685 (1970).

Local 676 asserts, however, that the mootness doctrine is "based upon flexible standards" which require, in order to meet either the probability or *Southern Pacific* tests, that Petitioners "demonstrate that the challenged activity will *probably* recur and that [their] interests will *probably* be affected." Local 676 brief, pp. 5, 6, 18-19 (emphasis added.) There are several fallacies in this contention. First, the mootness doctrine does not vary from factual situation to factual situation or even from

1. Local 676 argues that the "payment of welfare benefits ceased prior to the district court's dismissal of Super Tire's complaint." Local 676 brief, p. 6. The dismissal of the complaint, however, occurred at the June 24, 1971 hearing (App., p. 45) while the employees cessation of their strike and return to work which, rather than the ratification of a new contract, was the critical event in terminating eligibility for welfare assistance (see, e.g., App., pp. 130-132), admittedly did not take place until June 28, 1971. Local 676 brief, p. 4.

one category of cases to another. Rather than consisting of such a series of internally inconsistent and varied "flexible" standards, it is an evolving concept which, although in a current "state of flux" (Note, 83 Harv. L. Rev. at 1687-88), is based on common policies applicable to all cases and best approached through common criteria by which all controversies may be adjudicated. *Second*, there has never been a requirement that a party challenging governmental action must show that he will "probably" be affected by a recurrence of such conduct. *And finally*, while there may at one time have existed a different probability standard where the government was a defendant rather than a plaintiff, the inherent illogic[3] of this distinction has been evidenced in recent cases involving governmental defendants, such as *Sibron* v. *New York*, 392 U. S. 40, 51-53 (1968), and *Moore* v. *Ogilvie*, 394 U. S. 814 (1969),[4] where the likelihood of recurrent impact of the ob-

2. For example, in *Oil Workers* v. *Missouri*, 361 U. S. 363 (1960), one of the two authorities principally relied on by Local 676, the critical consideration, which Local 676 continues to ignore, is the "speculative" possibility there of a new emergency situation arising in the single industry involved sufficient to cause whomever was then Governor to exercise his discretion and invoke the disputed statute. *Oil Workers*, in this sense, presented a *sui generis* case. See *Division 1287, Bus Employees* v. *Missouri*, 374 U. S. 74, 78 (1963); and Petitioners' principal brief, p. 18. Similarly, in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953), the mootness progenitor of *Gray* v. *Sanders*, 372 U. S. 368 (1963), the other case principally relied on by Local 676, the "mere possibility of recurrent violation" was held sufficient "to keep the case alive." A respondent, in short, has "the heavy burden of persuasion" of showing that "subsequent events [have] made it absolutely clear that the allegedly unlawful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203 (1968).

3. See the brief *amicus curiae* of The Chamber of Commerce of the United States, pp. 14-22; and Note, 83 Harv. L. Rev. at 1691. In *Gray*, moreover, this Court applied the *Grant* government plaintiff test to a case where the government was the defendant. See also *Powell* v. *McCormack*, 395 U. S. 486, 562, n. 5 (1969) (dissenting opinion of Mr. Justice Stewart).

4. *Moore*, rather than the election cases cited by Local 676 (*Brockington* v. *Rhodes*, 396 U. S. 41 (1969), and *Hall* v. *Beals*,

jectionable conduct on *other* similarly-situated private plaintiffs, instead of the certainty of its recurrence as to the *same* plaintiff, was critical in finding those cases not to be moot. Similarly, the fact that the Petitioners were once directly harmed by the challenged state action, continue to be affected by both the availability of the disputed subsidies and their potential payment to striking employees (see Petitioners' principal brief, pp. 12-15), and represent, along with *amicus* Chamber, numerous other employers who are certain to be affected, insures Petitioners' personal stake in the outcome of this case and the continuing adversary context of the case. These considerations, particularly when viewed in the light of the relative brevity of the overwhelming majority of strikes contrasted with the time necessary to secure an appellate decision on the merits,[5] preclude a finding of mootness. See *Local 365, Cemetery Workers* v. *New York*, No. 73-594, where this Court last week denied certiorari, rather than granting certiorari and vacating the lower court's decision as moot, in a case in which the underlying strike had terminated, as here, prior to the decision below. 42 U. S. L. W. 3383 (Jan. 8, 1974). Local 676, in short, seeks to employ mootness criteria which have never existed and which, at least since *Moore* and *Sibron*, have been expressly repudiated.

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396 U. S. 45 (1969), where changes in law mooted challenges to no longer extant state policies), is the appropriate analogy to the present case. See also *Dunn* v. *Blumstein*, 405 U. S. 330, 334, n. 2 (1972), and *Fortson* v. *Toombs*, 379 U. S. 621 (1965).

5. The median duration of all work stoppages in the United States for the most recent year in which statistics are available is *eleven days*. U. S. Department of Labor, Bureau of Labor Statistics, Work Stoppages in 1971 (Selected Final Tabulations) (June 1972), p. 3, table 1. By contrast, the median time for a federal civil case from the filing of complaint to a decision by a court of appeals, where the case is briefed and/or orally argued to the appellate court, is *nineteen months*. 1973 Annual Report of the Director, Administration Office of the United States Courts, p. A-7, table B-5.

THE SUBSTANTIVE ARGUMENTS

Neither Respondent state officials nor the AFL-CIO contravert Petitioner's argument that, by making available to strikers substantial state assistance (see Petitioners' brief, p. 23, n. 26) which would not have been provided absent a strike,[6] there is a significant state intrusion upon the federal labor policy of free collective bargaining. Rather, they have argued that Congress intended precisely such state interference or, alternatively, that the failure of Congress to expressly prohibit state subsidies to strikers now bars any Supremacy Clause attack. Both of these contentions lack merit.

1. The State and AFL-CIO primarily direct their briefs at one portion of Petitioners' challenge: the New Jersey Assistance for Dependent Children program, N. J. S. A. 44:10-1 *et seq.*, promulgated under the federal Aid to Families of Dependent Children (A. F. D. C.) program, 42 U. S. C. § 602, *et seq.* The pertinent unemployed parent segment of that program, however, has not been in effect in New Jersey since June 30, 1971 and the present assistance programs, New Jersey's General Public Assistance, N. J. S. A. 44:8-107 *et seq.*, and Assistance

6. Petitioners do not, as the State (brief, pp. 18-22) and AFL-CIO (brief, p. . . . .) contends, seek to insulate labor relations from the "seamless web" of society. There is no claim, for example, that strikers, or their families who are judged by the same eligibility standards (42 U. S. C. § 607; App., pp. 118-120), should be precluded from any assistance which they may have received prior to the strike. Petitioners only argument is that neither management nor labor should receive *new* or *additional* public subsidies solely because they have chosen to resolve their differences by "a brute contest of economic power" (*N. L. R. B.* v. *Insurance Agents' Union*, 361 U. S. 477 (1960)), such as a strike or a lockout. See Petitioners' brief, p. 22, n. 5. Public benefits that would be provided regardless of whether a strike had occurred—e.g., veterans' assistance or public housing to strikers or government contracts or tax advantages to an employer—or private forms of assistance—e.g., a union or potential striker amassing a strike fund, a striker obtaining interim strike employment or an employer subcontracting or utilizing striker replacements—would clearly not constitute impermissible conduct. The state must simply remain neutral and pre-